Thorogood, J. : —I have had the advantage of reading the learned President's judgment with which I agree. I would however add the following comments regarding these proceedings.

The respondent in this matter instituted proceedings under the Guardianship of Infants Ordinance (Cap. 50). There were other possible courses open to him but he chose this course and is bound by the rules applicable thereto.

An application under Cap. 50 may be made in accordance with the Rules of the Supreme Court and the applicant/respondent took out what purported to be an Originating Summons under Order 52 rule 23 (1) (b) of the Rules. Except in the matters set out in Order 5 rule 11, it is necessary under Order 51 rule 7 to indorse on the Originating Summons a memorandum requiring the defendant or other respondent to enter an appearance within eight days from the day of service or in special circumstances within such time as the Court or a Judge directs. The application in these proceedings is not one of those set out in Order 51 rule 11.

On the document purporting to be an Originating Summons no one is named as respondent or defendant and there is no memorandum as mentioned above. The document, for what it was worth, was served on no one despite the statutory requirement that it must be served on the infant and anyone appearing to be interested or affected. There is no record that a Court or a Judge gave any direction as to time or dispensing with service on any person or that any application for such a direction was made as provided for by Order 52 rule 23 (3). Order 51 rule 12 applies where an Originating Summons has not been served by the day fixed for attendance. No action in accordance therewith appears to have been taken.

The provisions of Order 3 rule 4 would apply to the Originating Summons had the Consul-General sued in a representative capacity but no action was taken under that rule as, so we were informed, the applicant acted in these proceedings as the Consul-General of the Netherlands and not as an agent for the father. As the learned President has said, the claim in this matter is, however, based purely on the parental rights of the father.

It would appear that the document purporting to be an Originating Summons was prepared in a hurry and without adequate care for which the only reason given was that the intended respondent had indicated that she proposed to return with the infant to her home in Kemaman, Trengganu. She had been induced to come from Kemaman and to bring the infant with her to discuss proposals that she and the infant should proceed to Holland. It was found impossible to carry out such proposals and the intended respondent was at liberty to return home with the child. As far as I am aware there was, and is, nothing to prevent proper proceedings being instituted in the Federation of Malaya. However these proceedings were initiated in order to keep the infant within a jurisdiction in which she but casually found herself. The learned President has already commented upon that action.

It was suggested that the respondent had waived the lack of service on herself, but there has been no waiver or any suggestion thereof by the infant. The infant has not been served and has had no opportunity of being represented. It would appear that the issues were not properly framed and that by reason of the hasty and irregular manner in which these proceedings were initiated and continued, the mind of the learned Chief Justice was not properly directed to all the matters which should have been considered. I agree that the proceedings are, by reason of the non-service of necessary parties, a nullity and the orders made thereon should be set aside with costs both here and below to appellant.

Order accordingly.

K. S. ANWARI v. LEE LING NEO

[App. Civ. Juris. (Evans, J.) April 4, 1950]

[Singapore — District Court Appeal No. 2 of 1950]

Control of Rent Ordinance, 1947, s. 14(1) — *Validity of notice to quit* — *Subletting in breach of agreement* — *Refusal of application for adjournment* — *Right of appeal against ex parte order* — *District Court Rules, O. 25 r. 22.*

In this case the appellant appealed against an order made for possession of certain premises at No. 37 Lorong M, Telok Kurau. The summons was issued on the 6th of August, 1949, returnable for the 22nd August, 1949, and after several adjournments, it was fixed for hearing on the 8th of December, 1949. On that day counsel appeared for defendant-appellant and applied for an adjournment, and a medical certificate regarding the appellant's health was produced. The application was refused and counsel for the defendant-appellant withdrew. The learned District Judge then heard the plaintiff and

her witnesses and gave judgment for the plaintiff. The order was sought on two grounds — one under section 14(1)(b) of the Control of Rent Ordinance that there had been a subletting contrary to the terms of the tenancy agreement and the other under section 14(1)(f) of the Ordinance that the premises were required for the plaintiff's own occupation. The learned District Judge found that the plaintiff had proved her case for possession under section 14(1)(b) of the Ordinance. The tenancy of the premises ran from the 12th of the month but the notice sent to the defendant was to quit and vacate by the 31st of July, 1949.

Held, (1) that Order 25 rule 22 of the District Court Rules does not modify or reduce the right of appeal under section 17 of the Courts Ordinance but provides an alternative procedure for dissatisfied parties; (2) that the learned District Judge had a discretion to allow the application for adjournment or not and the appellate Court had no power to interfere with the exercise of his discretion as it was not shown that he had not exercised it judicially; (3) that the notice to quit in this case was bad and the appellant's tenancy had never been validly determined and therefore the appeal must be allowed.

Cases referred to :—

(1) *The Parisian* (1887) 13 P.D. 16.
(2) *Smith v. Poulter* (1947) 1 K.B. 341.
(3) *Barton v. Fincham* (1921) 2 K.B. 291.
(4) *Salter v. Lask* (1924) 1 K.B. 754.
(5) *Davies v. Warwick* (1943) K.B. 329.
(6) *Coplans v. King* (1947) 2 All E.R. 393.
(7) *Tendler v. Sproule* (1947) 1 All E.R. 193.
(8) *Dagger v. Shepherd* (1946) 1 All E.R. 133.

APPEAL from District Court.

L. A. J. Smith for the appellant.

A. J. Braga for the respondent.

Evans, J. : — The appellant appeals against an order made in his absence against him for possession of certain premises at No. 37 Lorong M, Telok Kurau Road. The summons was issued on 6th August 1949 returnable for 22nd. It actually came up on 29th when the case was adjourned to 31st October for mention, on which date on a joint application it was again adjourned to 8th December for hearing. On that day counsel appeared for defendant, and by so doing should have had full authority to consent to any order. He asked for an adjournment and seems to have intimated that he was unable to do anything and that counsel who should have appeared had not thought it necessary to do so. He did however produce what was accepted as a medical certificate regarding the defendant's health and stating the latter would not be fit for some months. How far the court accepted this as any evidence is not clear, but adjournment was opposed and refused. Defendant's counsel then withdrew, and the learned District Judge heard the plaintiff and her witnesses examining the plaintiff at length. He found that plaintiff had proved her case and made the order appealed against. He has given grounds of judgment at some length which are mostly concerned with the matter of the adjournment, one paragraph deals with the substance of the case, and one with a preliminary objection of his own to this appeal.

The Order is now said to be *ex parte* and the defendant should, therefore, it is said, apply to the District Court to have it set aside. The District Judge relies on section 1236 Civil Procedure Code. This is no longer in force, but similar provision is made by District Court Rules Order 25 rule 22. These rules are made by a District Judge and two advocates under section 89 of the Courts Ordinance (Cap. 10) and allowed by the Rules Committee of the Supreme Court. That Ordinance itself provides the dissatisfied parties' right of appeal in section 17 — "Subject to the provisions of this or any other Ordinance, an appeal shall lie from the decision of a District Court where the value of the subject matter exceeds $100." This is a very wide right of appeal. Ordinance in Singapore means ordinance only, and does not include rules made under it (Cap. 2 section 2). It would have been easy enough to confine this section to decisions between parties, or made the right conditional on, or postponed to, other procedure, but it is in my opinion quite impossible to argue that the rule modifies or reduces the section when it can well be read as alternative. There can be no doubt it provides a cheaper and more convenient procedure, and one more advantageous to the appellant who on any of the grounds need only show it would be just that he should be heard, while here he must show the judgment is bad.

The appellant also argued that, as he was alleging the order was made without jurisdiction, he could appeal as he could only be required to take proceedings to set aside a valid order. If the order is a nullity he can ignore it. While it may be true that he has a wider liberty as to the points he takes, or the court should take, on a matter of jurisdiction once he has got here, I don't think it gives him greater right to come. In coming he seeks the same thing, to get rid of the order, valid or invalid. I think there is nothing in this point.

The appellant's counsel also moved to adduce evidence of the defendant by affidavit despite the fact that he contended his client could not attend to be cross-examined on it. *The Parisian*[1] seems to show the value such evidence would have. Counsel did not persist with this motion.

The appellant's first ground of appeal is as to the refusal of adjournment and proceeding in the absence of the defendant. It is a matter in the District Judge's discretion with which I should not interfere unless it were shewn no judicial discretion was exercised. The solicitors then concerned are not now appearing for the defendant, but there is no apparent explanation or excuse for their conduct towards the District Court. The defendant would not be the first to suffer by the conduct of his lawyer; nor is his ignorance of the methods of taking evidence which the law provides, relevant on appeal. It may be that the only delay was the long adjournment, but the learned District Judge was doubtless conscious that an adjournment of such actions is in effect a judgment for the defendant for that period; the reason given for adjournment is common form, and the manner of giving it overbearing.

The order was sought on grounds (b) and (f) of section 14(1) of the Control of Rent Ordinance 1947. The learned District Judge refers to (m) but this is not covered by the plaint, nor is it now argued. I would point out that if the plaintiff proves the facts and the other considerations are fulfilled she is entitled to an order on either of these grounds which are alternative. All the evidence may have to be taken at once, but it must be assessed separately for two half cases do not make a whole. There is only one short paragraph on both grounds, and no attempt to distinguish them or the evidence on each. Reading this paragraph as liberally as I properly can, and implying a finding of subletting, I can only find a judgment on ground (b). I shall not therefore consider (f) at all, and the questions of hardship thereunder of which appellant had much to say.

On ground (b) the appellant has two reasons why the judgment should be overruled. The District Judge had failed to distinguish between a tenant and a lodger, and letting a lodging would not be a breach of the covenant, and secondly he had not found that a breach of the condition having been committed it was reasonable to give the respondent possession. This condition is to be found expressed in the most general language in the agreement of 11th October 1947: — "subletting is not permitted" which would seem to cover any letting. It may be true that in Singapore 'tenant' is often used when lodger would appear more correct, but it may not be necessary for a court to define the distinction between them.

I do not think it is necessary here. The facts, undisputed in the circumstances, are to be found in Morais' evidence. He is not living in one room of the house, nor so far as the evidence goes sharing any amenities, but is living in a servants' quarters which may be properly taken to be severable. It seems to me that there was evidence before the District Judge on which he could have properly found that there was a subletting, and that his judgment can only be reasonably read as implying such finding.

It is also true that there is no finding of reasonablessness nor even discussion of the conflicting reasons. There is on the other hand no indication that the District Judge felt compelled to his decision by law and duty.

The appellant also argued that the learned District Judge had failed to perform, what he described as, his statutory duty to enquire into the facts upon which the order, and his jurisdiction to grant it, depend. It appears a strange ground for a party to take who has deliberately withdrawn from the trial. He cites Denning L.J.'s dictum in *Smith v. Poulter*[2]: "it is the duty of the Court to see whether the conditions required by the Acts are satisfied." That is a very different case from this, there there had been no inquiry at all. The Lord Justice refers to *Barton v. Fincham*[3], *Salter v. Lask*[4] and *Davies v. Warwick*[5]. This duty is set out most fully in *Salter v. Lask*[4]. In both the early cases the Acts were not pleaded nor considered. Lord Goddard in *Davis v. Warwick*[5] is speaking of quite another matter, though one on which the appellant also might rely on this case, of taking points as to jurisdiction on appeal which were not taken in the court below. These cases are no authority on the manner or extent of the statutory duty, nor do they change the proceedings from a trial to an inquisition in which the court should institute inquiries. The fact of appellant being sick was before the District Judge, and appellant had a proper opportunity to be heard. The exact nature or extent of that opportunity might be of weight on an application to set aside, but have no bearing here when I am satisfied the proceedings were properly conducted. So too with the question of reasonableness. Evidence on which the District Judge might come to an opinion was given and he came to his decision freely. This is a matter for the discretion of the trial judge — *Coplans v. King*[6]. As Lord Morton (then L.J.) said in *Tendler v. Sproule*[7] "As to the second question whether it was reasonable to make an order for possession, that is, of course, within the discretion of the Judge." Very brief evidence had been given of the landlord's position and Lord Morton went on: "when evidence is led which is directed to the question of reasonableness and when the Judge gives a decision giving possession to

the landlord, this court will always assume that he has applied his mind to the question of reasonableness before giving his decision."

The appellant also argued, and indeed, opened his main appeal with the contention, that the notice to quit is bad. The tenancy runs from 12th of the month, and is so expressed in the agreement referred to before. The notice is to quit and vacate by 31st day of July 1949. I should have thought the notice obviously bad. The respondent cited *Dagger v. Shepherd*[8] which certainly enables a landlord, though not apparently a tenant, to save a notice which might be thought ambiguous by construing it in part as an offer. So respondent would say that as this notice was given on 7th June it was good and, meant that the tenancy was determined on 11th July and the tenant might if he wished remain to 31st July. It is I think unnecessary to say more as to the ambiguous character of the notice, than that respondent himself in his plaint construes it as a notice to quit on 31st July. I think it is clearly bad, and the appellant's tenancy has never been validly determined. This ground, which I think is substantially within the last ground of appeal in the petition is sufficient. On this ground, the appeal must be allowed, and but for the attacks which had been made on the way this case was heard, is all which I need have mentioned.

Appeal allowed.

In re ALSHAIKH ABDULLAH BIN ALI BIN AHMAD BIN ALSHAIKH ALI HARHARAH (Deceased);
SHAIKH SALIM BIN ABDULLAH BIN ALI BIN AHMAD BIN SHAIK ALI HARHARAH
v.
SHAIKAH HOWDASH BINTE SALIM NASER LAHMADI.

[Orig. Civ. Juris. (Thorogood, J.) July 22, 1950]

[Singapore — Originating Summons No. 144 of 1950]

Will — Mohammedan testator domiciled outside the Colony — Whether more than one-third of his estate can be disposed of by will — Whether heir's right of unrestricted enjoyment can be restricted.

A Shafi Mohammedan testator domiciled in Arabia made a will relating to immoveable property in Singapore whereby he directed that his whole estate should be divided in accordance with Mohammedan law twenty-one years after his death.

Held, that the testator had only power by his will to dispose of one-third of his estate; and that the whole estate of a deceased Mohammedan, or so much of it as has not been validly disposed of by will, devolves upon his heirs according to Mohammedan law at the moment of his death; and **semble** that the direction postponing distribution of the estate was contrary to Mohammedan law. Also **held**, that by the law of the Colony there was nothing to prevent immediate distribution of the estate.

E. C. Jeewa v. H. H. Yacoob Ally and anor.[5] and **Re Syed Hassan bin Abdullah Aljofri deceased**[1] followed.

Cases referred to :—

(1) *Re Syed Hassan bin Abdullah Aljofri deceased* (1949) M.L.J. 198.

(2) *Ranee Khujooroonissa v. Mussamut Roushun Jehan* L.R. 3 I.A. 291.

(3) *Kurrutulain Bahadur v. Nuzbat-ud-dowla Abbas Hossein Khan* I.L.R. 33 Cal. 116; L.R. 32 I.A. 244.

(4) *Jafri Begam v. Amir Muhammad Khan* I.L.R. 7 All 822.

(5) *E. C. Jeewa v. H. H. Yacoob Ally and anor.* A.I.R. (1928) Rang 307.

(6) *In re Mohamed Haniffa deceased* (1940) S.S.L.R. 249; (1940) M.L.J. 286.

(7) *Sheriffa Fatimah binte Aboobakar bin Mahomed Al Mashoor v. Syed Allowee* (1883), 2 Kyshe (Eccl.) 31.

(8) *Saunders v. Vautier* 4 Beav. 115.

(9) *Re Gossling, Gossling v. Elcock* (1903) 1 Ch. 448; 88 L.T. 279.

(10) *Re Tan Kim Seng deceased* 12 S.S.L.R. 1.

ORIGINATING SUMMONS.

John Laycock for the plaintiff.

C. C. Tan for the defendant.

John Laycock for the plaintiff, the executor of the will of the deceased :—

It is admitted by all parties in this case that the testator was an Arab domiciled in Arabia. His Will states that the testator's intention is to dispose of his property in accordance with Mohammedan Law. The testamentary powers of the Testator are governed by the *lex domicilii* (not the *lex loci situs*) which is in this case Arabia not Singapore. See *Re Syed Hassan bin Abdullah Aljofri deceased*[1]. The Testator was a Mohammedan of the Sunni Shafi Madzahab; so we are concerned with the Sunni Shafi Mohammedan law if there is any difference between the law applicable to the different Sects. A Mohammedan cannot in accordance with Mohammedan Law dispose by Will of more than one-third of his estate. See *Ranee Khujooroonissa v. Mussamut Roushun Jehan*[2]. See *Mulla's* Principles of Mohammedan Law 11th Edition Section 104.